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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL PHILLIP DUNIVANT,
EDGAR LEE ANTHONY and
MERRILL JAYE LIVINGSTON,
Petitioners,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

Counsel of Record:
JOHN C. WALDEN
Senior Assistant
Attorney General

Of Counsel:
MICHAEL R. JOHNSON
Assistant Attorney General

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-6344

QUESTIONS PRESENTED

1.

Whether the installation and use of the electronic tracking device by the law enforcement officers in the instant case constituted a search.

2.

Whether the installation and use of the electronic tracking device by the law enforcement officers in the instant case was a reasonable search and seizure.

3.

Whether the evidence seized in the instant case should have been suppressed by the trial court.

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STATEMENT OF THE CASE

On October 8, 1979, following a bench trial, Petitioners were convicted of one count of violating the Georgia Controlled Substances Act (possession of methamphetamine). All three Petitioners were sentenced to prison for four years. They are currently free on appeal bond.

On September 10, 1980, the Georgia Court of Appeals affirmed Petitioners' convictions. On November 5, 1980, the Georgia Supreme Court denied Petitioners' application for a writ of certiorari. On November 25, 1980, the Georgia Supreme Court denied Petitioners' motion for reconsideration of the denial of certiorari.

Petitioners' petition for a writ of certiorari was filed in this Court on January 23, 1981.

STATEMENT OF FACTS

In June of 1979, Drug Enforcement Administration (DEA) Agent Steve Starling received a communication from an employee of Scientific Products, Inc., a seller of chemical supplies located in Atlanta, Georgia. The employee notified Starling that individuals operating under the name of Anthony & Associates had ordered a quantity of chemicals. (Trial Transcript, hereinafter "T", at pages 28-29). Included among the chemicals ordered was benzyl chloride, a necessary ingredient of methamphetamine. (T. 34, 35). Methamphetamine is a controlled substance in Georgia, a Schedule II narcotic.

In early July, Starling, along with other DEA agents, placed an electronic tracking device (ETD) in one of the boxes of

benzyl chloride. (T. 37, 40). The EDT was placed in the box with the permission of Scientific Products, but without the knowledge of Petitioners. (T. 38, 44).

On July 12, 1979, Petitioner Dunivant arrived at Scientific Products and picked up his boxes of chemicals, including the box containing the ETD. (T. 35, 36). Dunivant was then followed by DEA agents to Carroll County, Georgia, a trip which took approximately two hours. (T.16). Six or seven DEA vehicles and one DEA airplane were involved in the surveillance. (T. 17). One of the cars and the airplane contained a tracking device to monitor the location of the ETD. (T. 42). All the DEA vehicles had constant radio contact with each other. (T. 46-47).

By using visual surveillance and the ETD, Dunivant was followed to a house in a

remote, rural area of Carroll County. Constant visual surveillance was maintained by the agents, except for a period of 3 to 5 minutes, when, because of the thick tree cover, visual contact was lost. (T. 18). The ETD signal helped the agents visually locate Dunivant's car. (T. 20). When located, the car was parked outside a house. (T. 48).

At that point, the agents returned to the local sheriff's office and obtained a warrant. (T. 49). A thorough search was then conducted of the house and an outbuilding. A quantity of methamphetamine was seized and Petitioners were arrested (T. 21, 57-58, 60).

Following their bench trial, Petitioners were found guilty and were sentenced to four years in prison. (T. 94, 102). They are currently free on appeal bond. (T. 104).

REASONS FOR NOT GRANTING THE WRIT

On their direct appeal, Petitioners contended in the Georgia Court of Appeals that the installation and use of the ETD by the law enforcement officers violated their Fourth Amendment right to be free of unreasonable searches and seizures. The Court of Appeals, in a well reasoned and thorough opinion, disagreed with Petitioners and affirmed their convictions. Respondent contends that the Court of Appeals decision was correct and is in no further need of elucidation by this Court.

A. THE INSTALLATION AND USE OF THE ETD BY THE AGENTS IN THE INSTANT CASE DID NOT CONSTITUTE A SEARCH.

In determining whether investigative activity constitutes a search so as to invoke the protections of the Fourth Amendment, it must be determined at the outset whether said activity violated defendant's "reasonable expectation of privacy." Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). On the facts of this case, the installation and use of the ETD did not abridge any of Petitioners' privacy rights.

It is certainly clear that the installation, especially, did not infringe on Petitioners' privacy. At the time the ETD was installed in the box of benzyl chloride, the chemical belonged to, and was in the possession of,

Scientific Products, Inc. Since the company gave its consent to the installation of the ETD, there was no Fourth Amendment violation. The Ninth and Fifth Circuits have both held that such installation is not a search within the ambit of the Fourth Amendment. See United States v. Bernard, 625 F.2d 854 (9th Cir. 1980); United States v. Lewis, 621 F.2d 1382 (5th Cir. 1980).

Even when possession of the chemical was transferred to Petitioners, there was no invasion of their reasonable expectation of privacy. This case is similar to the so-called contraband cases cited by Petitioners, in which it has been held that a person in possession of contraband has no reasonable expectation of privacy therein. United States v. Pringle, 576 F.2d 1114 (5th Cir. 1978); United States v. Emery, 541 F.2d 887 (1st Cir. 1976).

It is undisputed in the instant case that the chemicals purchased by Dunivant were not, in and of themselves, illegal. It is also not disputed, however, that the chemicals purchased by Dunivantwere instrumental to the manufacture of methamphetamine, an illegal substance, and were in fact used for such purpose. Consequently, the instant situation is logically indistinguishable from the typical contraband case. If an individual has no subjective expectation of privacy in contraband substances, then it is unclear how he would have a subjective expectation of privacy in materials which he intended to convert into contraband.

Several cases have recognized this point and have expanded the rationale of the contraband cases somewhat. For example, in United States v. Conroy, 589 F.2d 1258 (5th Cir.), cert. denied. 444 U.S. 831 (1979),

an ETD was installed by an informant on a ship which was being used to smuggle marijuana into the country. The Fifth Circuit affirmed in the face of a Fourth Amendment challenge, even though the ETD had been installed on the ship and not on the contraband itself. Similar cases which deal with ETD's placedon drug-smuggling airplanes are United States v. Curtis, 562 F.2d 1153 (9th Cir. 1977), cert. denied. 439 U.S. 910 (1978) and United States v. Miroyan, 572 F.2d 489 (9th Cir.), cert. denied. 439 U.S. 896 (1978). See also United States v. Bishop, 530 F.2d 1156 (5th Cir.), cert. denied. 429 U.S. 848 (1976)(ETD installed in bait money taken by bank robbers) and United States v. Perez, 526 F.2d 859 (5th Cir.), cert. denied. 429 U.S. 846 (1976)(ETD installed on television set given to defendant by undercover agents in exchange for heroin).

In the usual case, as in this case, ETD's are used only to aid law enforcement officers in the surveillance of persons suspected of committing crimes. Routine surveillance, of course, does not constitute a search. Likewise, devices which aid in surveillance, such as flashlights, binoculars, and the like, have traditionally not been held to violate the Fourth Amendment. See United States v. Dubrofsky, 581 F.2d 208, 211 (n.1) (9th Cir. 1978).

The use of an ETD is not more intrusive than traditional surveillance. For example, in the instant case, the ETD was installed when the box of chemicals was not in the possession, control, or ownership of Petitioners. The ETD was used to aid the officers in following Petitioner Dunivant, nothing more, and when Dunivant left his car and went into a house, the agents obtained a search warrant.

The instant case is remarkably similar to a previous decision of the Ninth Circuit. In United States v. Hufford, 539 F.2d 32 (9th Cir. 1976), cert. denied. 429 U.S. 1002 (1977), the defendant ordered two drums of caffeine from a drug supply company. Caffeine, of course, is not illegal by itself, but, in quantity, is used to produce amphetamines. The drug company notified the law enforcement officers, and they installed an ETD on one

of the drums. The defendant picked up the drum and was followed by the officers, who arrested him. As in the instant case, the ETD was necessary at one point to locate the defendant. In holding that the Fourth Amendment was not implicated by the officer's actions, the Ninth Circuit said:

> "Hufford did not have a reasonable expectation of privacy as he drove along the public road. While he hoped that his travel would go unmonitored, his movements were knowingly exposed to the public, and therefore are not a subject of Fourth Amendment protection. . . . We see no distinction between visual surveillance and the use of an electronic beeper to aid the agents in following the movements of an automobile along public roads

provided no Fourth Amendment violation occurred when the beeper was attached." 539 F.2d at 33-34.

As discussed above, there was no Fourth Amendment violation when the ETD in the instant case was attached, since lawful consent was given by the then-owner of the chemicals. Hufford was correctly decided and is directly applicable to the instant case.

In summary, therefore, the installation of the ETD was not a violation of Petitioners' privacy because they did not own the chemical when the ETD was installed. Likewise, no privacy interests were infringed upon by the use of the ETD. Petitioners did not have a reasonable expectation of privacy in chemicals used to manufacture contraband. Furthermore, the ETD was used as a surveillance tool, and surveillance does not infringe upon the Fourth Amendment. Consequently, for all these reasons, certiorari: should not be granted by this Court.

B. ASSUMING THAT THE INSTALLATION AND USE OF THE ETD IN THE INSTANT CASE CONSTITUTED A SEARCH, SAID SEARCH WAS NOT UNREASONABLE IN VIOLATION OF THE FOURTH AMENDMENT.

The Fourth Amendment, of course, protects citizens from "unreasonable searches or seizures". Assuming arguendo that the installation and use of the ETD by the DEA agents in the instant case constituted a search, said search was reasonable and not prohibited by the Fourth Amendment.

In determining whether a warrantless search is reasonable, a court must balance the degree of intrusion against the public interest to be served by the search. There are cases which have held that the use of an ETD constitutes a reasonable search. See generally United States v. Shovea, 580 F.2d 1382 (10th Cir. 1978), cert. denied

440 U.S. 908 (1979); United States v. Clayborne, 584 F.2d 346 (10th Cir. 1978). In the instant case, an objective balancing of interests clearly indicates that the degree of intrusion was miniscule compared to the importance of the public interest which it served, and hence that the use of the ETD constituted a reasonable search.

First, the DEA agents were sensitive to Petitioners' privacy rights. The ETD was installed prior to Petitioners' obtaining any property interest in the chemicals. Any intrusion caused by the installation of the ETD, therefore, was suffered by Scientific Products, and not Petitioners. Also, the nature of the device itself was less intrusive than, say, a common wiretap. The ETD did not eavesdrop on conversations or record information. It merely aided the agents in determining the location of the

dangerous chemical. As DEA Agent Don Golden testified at trial, the ETD was used simply as a back-up device designed to supplement the visual surveillance conducted by the agents. (T. 72).

Another way in which the ETD was minimally intrusive was its location. It was not placed on Petitioner's Dunivant's person, and was not even affixed to his automobile. Rather, it was placed in a box containing a chemical which Petitioners intended to use to manufacture an illegal drug. Certainly, the privacy interests implicated by such a placement are far less than those which attach to traditionally more protected areas, such as house, person, or even automobile.

Finally, the use to which the agents put the ETD indicates the relatively slight intrusion which it arguably had upon Petitioners' privacy. The ETD was used simply to aid in surveillance of Petitioner Dunivant as he drove from Atlanta to Carroll County. Before the agents undertook a more serious intrusion, the search of the house, they obtained a search warrant from a neutral magistrate.

Balanced against this relatively minor intrusion is the important state interest in combatting drug-related crime. In the last few years, society has witnessed a dramatic increase in such crime, as well as an increasingly louder public outcry to "do something about it." In light of these very real public considerations, the intrusion into Petitioner's personal privacy can hardly be deemed to take priority. Consequently, the search under-

taken with the use of the ETD was reasonable. Certiorari should not be granted on this issue.

C. EVEN IF THE USE OF THE ETD IS DEEMED TO BE AN UNREASONABLE SEARCH, THE FRUITS OF THE SEARCH OF THE HOUSE SHOULD NOT BE SUPPRESSED.

Petitioners claim that the fruits of the search of their house and laboratory should be suppressed because the use of the ETD constituted an unreasonable search in violation of the Fourth Amendment. Such an assertion ignores the fact that a warrant was obtained for the search of the residence. Therefore, since the warrant is not attacked in the instant petition, the admission of the evidence was proper, and a grant of certiorari would be unnecessary.

Another reason why the exclusionary rule should not be applied in the instant case is that the DEA agents were guilty of no police misconduct. The purpose of the exclusionary rule, as has been repeatedly

held by this Court, is the deterrence of police misconduct.

In the instant case, as discussed in detail above, the police took pains to ensure that the ETD constituted the least possible intrusion. It was intended as a back-up device only, and was not used to gain entry to the residence. A separate warrant was obtained for that. In short, the DEA agents behaved in a reasonable and good faith manner. They did not run roughshod over Petitioners' constitutional rights. Consequently, they, and the general public, should not be penalized for this good faith behavior. The evidence was properly admitted; certiorari should not be granted on this issue.

CONCLUSION

It is Respondent's strongly held position that the installation and use of the ETD was not an invasion of privacy, so it cannot be deemed a search for Fourth Amendment purposes. Even if a search, however, said search was reasonable and was conducted in a good faith manner. The exclusionary rule, therefore, should not apply.

Petitioners' allegations are without merit. There are no issues present in the instant case which require this Court's adjudication on certiorari. Consequently, the writ should be denied.

Respectfully submitted,

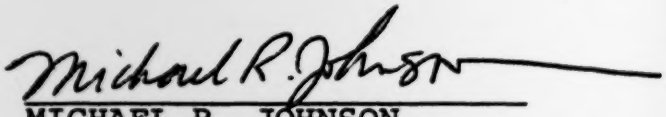
ARTHUR K. BOLTON
Attorney General

(Signatures Continued)

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General
Counsel of Record
for the Respondent



MICHAEL R. JOHNSON
Assistant Attorney General
Of Counsel

CERTIFICATE OF SERVICE

I, John C. Walden, Counsel of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for Respondent In Opposition upon Petitioners' attorneys by depositing a copy of same in the United States Mail, with proper address and adequate postage to:

Mark J. Kadish
Rhonda A. Brofman
Rosalyn S. Kadish
Kadish, Davis & Brofman, P.C.
Suite 701
66 Luckie Street, N.W.
Atlanta, Georgia 30303

This the ___ day of February, 1981.

JOHN C. WALDEN

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